CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 569

DAVIES MOTORS, INC., PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 13, 1930

CERTIORARI GRANTED FEBRUARY 24, 1930

(34,700)

(34,700)

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 14, 1930

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Names and Addresses of Attorneys.

For Appellant:

YOUNG & YOUNG, Esqs., Pacific Mutual Building, Los Angeles, California.

For Appellee:

SAMUEL W. McNABB, Esq., United States Attorney.

HARRY GRAHAM BALTER, Esq., Assistant United States Attorney, Federal Building, Los Angeles, California.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION.

UNITED STATES OF AMERICA, Libelant, vs. ONE WILLYS-KNIGHT ROADSTER AUTOMOBILE, Engine #27-260, Respondent, and DAVIES MOTORS, Inc., a corporation, Intervener.	)	No. 466-H CITATION ON APPEAL

To the United States of America, Libelant herein, and to Samuel W. McNabb, United States Attorney and Harry Graham Balter, Deputy United States Attorney, its attorneys:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the city of San Francisco in the State of California, on the 26th day of July, A. D. 1929, pursuant to Order allowing appeal filed in the Clerk's office for the District Court of the United States in and for the Southern District of California, in that certain cause wherein you are defendant in error and the Davies Motors, Inc. is plaintiff in error, and you are hereby requested to

show cause, if any there be, why the decree rendered in the above entitled case confiscating and forfeiting to the United States Government and why the decree entered in the said Order allowing appeal should not be corrected and reversed and speedy justice done to the Intervener in that behalf.

WITNESSETH, the Honorable William P. James, United States District Judge for the Southern District of California, this 28 day of June, A. D., 1929, and of the Independence of the United States, 153.

Wm. P. James

United States District Judge For the Southern District of California.

[Endorsed]: Received copy of the within Citation on Appeal this 28th day of June 1929 Ignatius F. Parker Asst. U. S. Attorney Attorney for Libelant Filed Jun. 28, 1929. R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk

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[TITLE OF COURT AND CAUSE.]

LIBEL

The United States of America, by SAMUEL W. McNABB, United States Attorney for the Southern District of California, and Harry Graham Balter Assistant United States Attorney for said District, respectfully shows:

COUNT I.

Paragraph 1.

That on or about the 27th day of September, 1928, at Fresno, County of Fresno and within the Northern Division of the Southern District of California, and

within the jurisdiction of the United States and this Honorable Court, PAUL L. MATHIAS, duly authorized, appointed and acting agent of the COMMISSIONER OF PROHIBITION of the United States, seized a certain WILLYS-KNIGHT ROADSTER AUTOMOBILE, engine number 27-260, in which said automobile there was then and prior thereto, concealed and deposited by HANS P. MORTENSEN (alias H. P. BENDER) certain goods, merchandise and commodities, to-wit: Five (5) pints of distilled spirits, upon which there was then due certain taxes imposed by the Act of November 23, 1921, known as the Willis-Campbell Act and the Revenue Act of 1921.

Paragraph 2.

That the said automobile has been appraised, as provided by law, at the sum of Twelve Hundred Dollars ($1200.00).

Paragraph 3.

That the said taxes due and imposed, as aforesaid, had not been paid, and the said goods, merchandise and commodities were concealed and deposited in said automobile with the intent to defraud the United States of the said taxes.

Paragraph 4.

That the said deposit and concealment of the said goods and commodities in said automobile was and is a violation of the provisions of Section 3450 of the Revised Statutes of the United States and the said automobile is subject to condemnation, forfeiture and sale.

COUNT II.

For additional cause of condemnation and forfeiture of the above described automobile the United States of America, by SAMUEL W. McNABB, United States Attorney for the Southern District of California, and *Samuel W. McNabb* Assistant United States Attorney for said District, respectfully shows:

Paragraph 1.

That on or about the 27th day of September, 1928, at Fresno, County of Fresno and within the Northern Division of the Southern District of California, and within the jurisdiction of the United States and this Honorable Court, PAUL L. MATHIAS, duly authorized, appointed and acting agent of the COMMISSIONER OF PROHIBITION of the United States, seized a certain WILLYS-KNIGHT ROADSTER AUTOMOBILE, engine number 27-260, in which there was then and there possessed, deposited and concealed a certain quantity of distilled spirits, to-wit: Five (5) pints of whiskey, which said distilled spirits was merchandise unlawfully smuggled into the United States from a foreign country without the payment of duties and taxes imposed by Section 900 of the Revenue Act of 1926, and without securing a permit from the Commissioner of Prohibition or the Collector of Customs to enter and bring said merchandise into the United States.

Paragraph 2.

That the said ONE WILLYS-KNIGHT ROADSTER AUTOMOBILE, engine number 27-260, has been appraised, as provided by law, at the sum of Twelve Hundred Dollars ($1200.00).

Paragraph 3.

That the said duties due and imposed upon the said merchandise had not been paid and the said merchandise had been unlawfully smuggled and introduced into the United States by parties unknown, with the intent to evade the payment of said duties and to defraud the revenue of the United States.

Paragraph 4.

That the smuggling into the United States of the said merchandise without the payment of the duties due thereon and without securing a permit to enter and bring the said merchandise into the United States and to defraud the revenue of the United States have subjected the said automobile to condemnation, forfeiture and sale under the provisions of Sections 3061 and 3062 of the Revised Statutes.

PRAYER

WHEREFORE, the United States Attorney prays that the usual process issue against the said automobile, and that all persons interested in and concerned in the said automobile be cited to appear and show cause why such forfeiture should not be adjudged, and that all due proceedings being had therein, this Honorable Court may be pleased to condemn the said automobile as forfeited to the United States, and that a judgment condemning the said automobile may thereupon be made and entered, and that the said judgment may also order the same to be sold by the United States Marshal, as provided by law and that a Writ of Venditioni Exponas may issue directed to the Marshal for that purpose and for such other and

further judgment and order as to the Court may seem proper in the premises.

SAMUEL W. McNABB,
United States Attorney.
Harry Graham Balter
Assistant United States Atorney.

[Endorsed]: Filed Jan. 2, 1929. R. S. Zimmerman, Clerk. By M. L. Gaines, Deputy Clerk

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[TITLE OF COURT AND CAUSE.]

COMPLAINT IN INTERVENTION.

Davies Motors, Inc., a corporation, by William K. Young, its attorney respectfully shows:

I.

That the intervener is a corporation organized and existing under and by virtue of the laws of the State of California and authorized to do business and doing business as a dealer in Willys-Knight automobiles in the City of San Diego, State of California.

II.

That on May 3rd, 1927 Mrs. H. P. Mortensen purchased from said corporation a Willys-Knight automobile under conditional contract of sale pursuant to which said corporation retained the title thereof until the purchase price should have been fully paid. That at the time of said sale said corporation, in accordance with its custom, required and secured a credit statement from said purchaser in which said purchaser alleged that H. P. Mortensen, her husband, was engaged in the interior decorating business on his own account and had been so engaged for a period of eight years. As assets said purchaser listed a house and

lot in Omaha, Nebraska of the then value of Eight Thousand Dollars ($8,000.00) and also gave two references, both of which said corporation investigated and found satisfactory. That said purchaser made the payments on said car regularly and on the due date and on June 22, 1928, at the solicitation of one of said corporation's salesman, said purchaser traded in the Willys-Knight purchased on May 3, 1927 and purchased the Willys-Knight roadster, engine #27-260, referred to above, on conditional sales contract under and pursuant to the terms of which said corporation retained the title thereto until all payments should have been completed; a copy of said contract is attached hereto and made a part hereof as though specifically set forth at this place and marked Exhibit "A".

III.

That the sale price of the Willys-Knight roadster purchased on June 22, 1928 was Thirteen Hundred ninety-five Dollars ($1395.00) and the unpaid balance after allowing credit for the equity in the car applied as down payment was Eight Hundred ninety-six Dollars ($896.00) plus insurance and financing charge; that the contract of sale attached hereto as Exhibit "A" required said purchaser to pay the sum of Fifty-seven Dollars ($57.00) per month, commencing with July 22, 1928.

IV.

That on July 22, 1928 said payment of Fifty-seven Dollars ($57.00) then due was not made and said corporation sent a collector to the purchaser's resident and he ascertained that purchaser and her husband had moved to Fresno, thereupon demand was made

upon the purchaser and part of said Fifty-seven Dollars ($57.00) payment was made on August 6th and the balance thereof on August 7, 1928.

V.

That said corporation had no notice either actual or constructive that said automobile was being used for illegal purposes either as charged in said libel or otherwise and knew of no facts or circumstances which would reasonably or otherwise lead it to believe that said auotmobile was being so used; that on the contrary due to the experience which said corporation had had with said purchaser since the date of the first sale, to-wit: on May 3rd, 1927, said corporation and its officers and agents thereof have every reason to believe and did believe that said car was being used legally and that the purchaser and her husband were reliable, law-abiding citizens and responsible people to be accepted as purchasers of said automobile.

VI.

That the Davies Motors, Inc. is now and at all times herein mentioned has been the legal owner of said Willys-Knight roadster automobile; that no payments have been made under and pursuant to the terms of the aforesaid conditional sales contract attached hereto as Exhibit "A" since the said 7th day of August, 1928 and said Davies Motors, Inc. is, under and pursuant to the terms thereof, entitled to the immediate and exclusive possession of said automobile and to all legal and equitable rights therein as the exclusive owner thereof.

VII.

That on or about the 27th day of September, 1928, in the City of Fresno, County of Fresno, State of

California, one Paul L. Mathias, a duly authorized, appointed and acting agent of the Commissioner of Prohibition of the United States of America, seized, arrested and took into custody Hans P. Mortensen, heretofore referred to as H. P. Mortensen, for the alleged unlawful possession and transportation of 12 one pint bottles of intoxicating liquor, in violation of the Act of October 28, 1919 and at the same time and place of said arrest transporting five pints of intoxicating liquor then and there containing more than ½ of 1% of alcohol by volume, in violation of the act of October 28, 1919, and ever since said time said automobile has been, and now is, held by and in the possession and custody of the Commissioner of Prohibition of the United States of America.

VIII.

Intervener is informed and believes, and therefore alleges, that at the time of said arrest and confiscation the said Hans P. Mortensen was transporting in said Willys-Knight automobile five pint bottles of intoxicating liquor fit for beverage purposes then and there containing more than ½ of 1% of alcohol by volume contrary to the act of October 28, 1919.

IX.

That thereafter and on the 3rd day of October, 1928 said Paul L. Mathias swore to a complaint before Samuel F. Hollins, a United States Commissioner, duly appointed by the District Court of the United States of America for the Southern District of California, charging the said Hans P. Mortensen with the unlawful possession and transportation of 12 one pint bottles of intoxicating liquor in the County of Fresno,

State of California, on the 27th day of September, 1928, in violation of the Act of October 28, 1919.

X.

That pursuant to said affidavit of complaint and on the said 3rd day of October, 1928 said Samuel F. Hollins, United States Commissioner, issued a warrant for the apprehension of said Hans P. Mortensen, and said Hans P. Mortensen was taken into the custody of the United States Marshal in and for the Southern District of California and was by said Marshal deprived of his liberty and detained as a prisioner for the violation of said Act of October 28, 1919, to-wit: Possession and transportation of intoxicating liquor fit for beverage purposes.

XI.

That a copy of said affidavit of complaint and a copy of said warrant is each attached hereto and made a part hereof by reference as though specifically set forth at this place and marked Exhibit "B" and Exhibit "C", respectively.

XII.

That said Davies Motors, Inc. is entitled to the delivery of said automobile to it by the said Commissioner of Prohibition or by any person now in possession or control thereof.

WHEREFORE, Davies Motors, Inc. pray judgment herein that the libelant take nothing by this action and that said automobile be ordered delivered to this intervener and for other and further relief as to the court may seem proper.

YOUNG & YOUNG,
By De Forrest Home
Attorneys for the Intervener.

STATE OF CALIFORNIA,)
) ss.
COUNTY OF LOS ANGELES.)

William K. Young being by me first duly sworn, deposes and says: That he is the attorney for the Davies Motors, Inc., Intervener herein, and makes this affidavit in its behalf for the reason that none of its officers reside within the County of Los Angeles; that he has read the foregoing Complaint in Intervention and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

William K. Young

SUBSCRIBED and sworn to before me this 22nd day of January, 1929

[Seal] B. Newbill

Notary Public in and for the County of Los Angeles, State of California.

Original.

AGREEMENT.

DAVIES MOTORS, INC., hereinafter called "Owner", hereby agrees to sell to MRS. H. P. MORTENSEN hereinafter called "Purchaser", who hereby agrees to buy, that certain WILLYS KNIGHT Automobile Type 66 Road, Car No. .....Motor No. 27260 License No. 1758011, together with such attachments, accessories, parts and equipment as are now upon and delivered with the same, for the total purchase price of FIFTEEN HUNDRED THIRTY NINE 48/100 ($1539.48) Dollars, U. S. Gold Coin, of present standard weight and fineness, payable at owner's place of business in San

Diego, California, as follows: FOUR HUNDRED NINETY EIGHT 40/100 ($498.40) Dollars in cash at date hereof, and the balance of TEN HUNDRED FORTY ONE 08/100 ($1041.08) Dollars, payable as follows: $57.00 on 22nd each month for 17 months start July 22, 1928 $72.08 on 22nd of 18th mo. together with interest from maturity on all sums remaining unpaid, at the rate of eight per cent. per annum, payable monthly at the office of the owner, or assignees, upon the following terms and conditions:

(1) Time is of the essence of this contract, and acceptance by said owner of any payment after same is due shall not constitute a waiver by owner of this provision.

(2) The title to said automobile, and parts added thereto, shall remain in owner until purchaser's complete performance of all the provisions of this agreement.

(3) If said purchaser defaults in any of the above payments, when due, or defaults in any provision of this contract, or if said automobile is attached or levied upon under any writ or process of any court, or if said purchaser is declared a bankrupt, said owner may, at his option, without previous demand or notice, (First) Retake possession of said automobile and all its new and old equipment and accessories, with or without process of law; and all payments theretofore paid hereunder shall thereupon be forfeited to said owner for the use, wear, tear and depreciation of said automobile, and this contract shall thereupon terminate and all rights of purchaser in this contract and said automobile shall thereupon cease, and are hereby waived; or (Second) said owner

may declare the whole of the sums then remaining unpaid to be immediately due and payable, and sue therefor; or he may take possession of said automobile and accessories and sell the same, without notice to purchaser, either at public or private sale, and apply the proceeds of said sale upon the whole amount due, together with interest, costs and attorney's fees as herein provided, and should the proceeds of said sale be insufficient to pay the amount so remaining unpaid as aforesaid, together with interest, costs, attorney's fees and costs of sale, the undersigned purchaser agrees to pay the owner, successor or assigns, the balance so remaining unpaid. In case suit is brought or other proceeding taken to recover said property, or any part thereof or all or any part of the amount due under this agreement, said purchaser agrees to pay all costs and 10% of the purchase price of said automobile as attorney's fees to said owner.

(4) The loss or destruction or theft of, or damage to, said automobile, from any cause, are at purchaser's rick, and shall not relieve the purchaser from his obligation to make all payments herein specified.

(5) Said purchaser agrees, during the life of this contract, to exhibit said automobile to said owner upon demand, and to keep said property in good order and repair to the satisfaction of owner and promptly pay all taxes levied or assessed thereon, and keep the same insured in owner's or his assignee's name, in a sum not less than the unpaid balance, against fire, theft, and unlawful conversion, in companies satisfactory to owner, and all policies to be retained by owner. If said purchaser does not pay said taxes when due, or keep said automobile insured or in good

repair as aforesaid or pay any lien for any reason existing on said property, the owner may do so and pay therefor and add same to the next installment of the purchase price due hereunder, and said purchaser agrees to repay the amount or cost thereof, with such payment; said owner may take possession of said automobile for the purpose of putting same in repair as aforesaid, but the taking possession thereof for such purpose shall not operate as an election by owner to terminate this contract.

EXHIBIT "A"—Page 1

(6) All bills for repairs done upon and material furnished for said automobile by said owner during the *left* of this agreement, shall be added to the purchase price of said automobile, and be payable to said owner, on the tenth day of the next succeeding month, and purchaser acquires no right or title in or to said personal property until all such bills have been paid by him.

(7) Said purchaser agrees that he will not, and has no right to, assign, pledge, mortgage, or otherwise dispose of this contract, or said automobile or any part thereof, or use or permit said automobile to be used, for rental purposes, or remove the same from the county of San Diego, State of California, or incur any bills, other than with owner, for repairs to said automobile in excess of $10.00, during the existence of this agreement, without the written consent of said owner.

(8) Purchaser agrees to pay all taxes and revenue charges of every nature whatsoever levied or assessed, or to be levied or assessed against said automobile, or against the debt evidenced by this agreement.

(9) Said purchaser agrees to save said owner harmless from any and all liability, including all costs and attorney's fees, for all injury or damage to persons or property caused in any manner by the use of said automobile during the *left* of this agreement.

(10) Upon the full, complete and strict compliance by said purchaser with all the provisions hereof and payment of all moneys due on this contract, at the times and in the manner herein set out (and not otherwise) title to said automobile shall pass to said purchaser and the said owner agrees to thereupon execute a bill of sale of said automobile to said purchaser.

(11) It is agreed that said automobile is now in good repair and condition, and that this instrument contains the entire agreement between the parties and shall not be binding upon owner unless signed by an official of the company.

(12) This agreement shall inure to the benefit of and be binding upon the heirs, executors, administrators and successors of the respective parties hereto, and the assigns of said owner.

(13) The assignment of this contract by the owner shall operate to transfer the title to said property and all of the rights of the owner hereunder to said assignee without notice of said assignment to the purchaser.

(14) It is distinctly understood and agreed that during the term of this contract, the automobile herein agreed to be sold shall not be used for the transportation of intoxicating liquors, drugs or narcotics, and shall not be used in or about the violation of any United States, state or municipal statute law or ordi-

nance. Any violation of this provision shall forthwith terminate this contract and any and all rights of the purchaser in or to said automobile and the possession thereof, and without notice or demand of any character, the owner shall take immediate possession of said automobile and all accessories, using all necessary force so to do, and any and all rights of the purchaser in or to said automobile or the possession thereof shall thereupon be immediately forfeited and the owner shall be and become the sole owner of the same and each and every part thereof and right and interest therein and shall be alone and solely entitled to the possession thereof, and all payment previously made by the purchaser shall be retained for depreciation in value and for the use of said automobile, and the purchaser hereby waives all rights to the moneys so paid and all rights against the owner for taking possession of said automobile.

(15) The waiver by the owner of any breach of any covenant or agreement herein contained on the part of the purchaser shall not be deemed or held to be a waiver of any subsequent or other breach of said covenant or agreement nor a waiver of any other covenant or agreement herein contained.

Executed in Triplicate, this 22nd day of June, 1928, at San Diego, California.

DAVIES MOTORS, INC., Owner.

By .....

Owner.

.....

Purchaser.

Address: Town San Diego, State Calif.
No. 3820 Louisiana Street.

EXHIBIT A—Page 2.

AFFIDAVIT OF COMPLAINT.

U. S. Rev. Stat.

United States of America;
Southern District of California, } ss.

BE IT REMEMBERED, That on this 3rd day of Oct. in the year of our Lord one thousand nine hundred and 28, before me, DAVID B. HEAD, United States Commissioner duly appointed by the District Court of the United States of America for the Southern District of California, to take acknowledgments of bail and affidavits, and also to take depositions of witnesses in civil causes depending in the Courts of the United States, etc., pursuant to the Acts of Congress in that behalf, personally appeared

PAUL L. MATHIAS, Fed. Agt.

who being duly sworn, according to law, deposes and says that

HANS P. MORTENSEN, alias H. P. Bender,

heretofore to-wit on or about the 27th day of Sept. in the year of our Lord one thousand nine hundred and 28 and within the jurisdiction of the United States aforesaid and of this Honorable Court Did willfully, wrongfully, and unlawfully possess and transport 12 one pint bottles of intoxicating liquor in the County of Fresno, State of California, in violation of Act of Oct. 28, 1919 contrary to the form of the Statutes of the United States in such case made and provided, and against the peace and dignity of the said United States.

SUBSCRIBED AND SWORN TO before me this 3rd day of Oct. 1929.

Paul L. Mathias
SAMUEL F. HOLLINS
United States Commissioner.

I hereby certify that the above is a true and correct copy of the original.

[SEAL] Samuel F. Hollins.

EXHIBIT "B."

UNITED STATES OF AMERICA.
SOUTHERN DISTRICT OF CALIFORNIA, ss.

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Marshal of the United States for the Southern District of California, and to his Deputies, or any or either of them, Greetings:

WHEREAS, complaint on oath has been made to me charging that HANS P. MORTENSEN, alias H. P. Bender on or about the 27th day of Sept. in the year of our Lord one thousand nine hundred and 28 and within the jurisdiction of the United States, and within the jurisdiction of the Honorable the District Court of the United States, in for the Southern District of California, Did willfully, wrongfully and unlawfully possess and transport 12 one pint bottles of intoxicating liquor in the County of Fresno, State of California, in violation of the Act of Oct. 28, 1919

NOW, THEREFORE, you are hereby commanded, in the name of the President of the United States of America, to apprehend the said HANS P. MORTENSEN, alias H. P. Bender and bring his body forth-

with before me, a United States Commissioner appointed by the District Court of the United States, for the Southern District of California, at my office, in the City of Los Angeles, that he may then and there be dealt with according to law for the said offense.

GIVEN UNDER MY HAND AND SEAL, this 3rd day of Oct. in the year of our Lord, one thousand nine hundred and 28 and of our independence the one hundred and fifty second

[SEAL] SAMUEL F. HOLLINS
U. S. Commissioner for said District.

EXHIBIT "C."

In obedience to the within warrant, I have the body of HANS P. MORTENSEN before DAVID B. HEAD, U. S. Commissioner, this 5th day of Oct. 1928.

A. C. SITTEL
U. S. Marshal.
By S. J. Shannon
Deputy.

In jail Fresno Oct 4/28 at 3:30 P. M.

[Endorsed]: Received copy of the within this 22nd day of Jan. 1927. E. E. Doherty. Filed Jan 22, 1929. R. S. Zimmerman, Clerk, by M. L. Gaines, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

STIPULATION OF FACTS

IT IS HEREBY STIPULATED by and between counsel, United States of America, Libelant, and

Daview Motors, Inc., a corporation, Intervenor and Claimant, that the facts in this case are as follows:

I.

That on or about the 27th day of September, 1928, and at all times hereinafter mentioned in this Stipulation of Facts, Paul L. Mathias was and is a duly authorized and Acting Agent of the Commissioner of Prohibition of the United States;

II.

That on or about the 27th day of September, 1928, in the City of Fresno, County of Fresno, and within the Northern Division of the Southern District of California, the said Paul L. Mathias, acting on behalf of and for the said Commissioner of Prohibition of the United States, seized a certain Willys-Knight Roadster automobile, Engine No. 27-260, being the same automobile as is the respondent in the above named libel;

III.

That at the time the said respondent automobile was seized, as aforesaid, there was concealed and deposited therein, certain goods, merchandise and commodities, to-wit: Five (5) Pints of distilled spirits; that the said distilled spirits were fit for beverage purposes and then and there contained more than one-half of one per cent of alcohol by volume; that there was due upon the said Five (5) Pints of distilled spirits, certain taxes imposed by the Act of November 23, 1921, known as the Willis-Campbell Act, and by the Revenue Act of 1921; that at the time when the said distilled spirits were concealed and deposited in the said automobile, as aforesaid, the taxes due

thereon were unpaid and still remain unpaid; that there were no marks, stamps or labels on the said bottles of said distilled spirits to indicate that said taxes due thereon had been paid;

IV.

That the facts of the seizure are as follows: That on the evening of September 27, 1928, Agent Paul L. Mathias stationed himself in the rear of the Sequoia Hotel, in the City of Fresno, State of California, and there saw one Hans P. Mortensen, alias H. P. Bender, in the act of removing Five (5) Pints of Mexican Smuggled whiskey, bearing the label "Border Bell Bourbon Whiskey, etc.", from the said respondent automobile; that the said Mortensen had deposited and concealed the said smuggled whiskey in the respondent automobile with the intent to defraud the United States Government of the taxes due thereon; in violation of the provisions of Section 3450 Revised Statutes; it is stipulated that Hans P. Mortensen would testify that on the night in question, just prior to the seizure, he drove up to the back of the Sequoia Hotel in the respondent automobile in which liquor was found; it is further stipulated, however, that Paul L. Mathias, Prohibition Agent, would testify that when he arrived at the rear of the hotel to make the seizure, the Willys-Knight automobile was standing still, and at the time when the seizure was actually made, it was not in motion

V.

That on the 3rd day of October,1928, the said Paul L. Mathias swore out a complaint before Samuel F. Hollins, United States Commissioner at Fresno, Cali-

fornia, in which he charged that the said Hans P. Mortensen, alias H. P. Bender, did, on the 27th day of September, 1928, unlawfully possess and transport Twelve (12) one pint bottles of intoxicating liquor; that on the 19th day of November, 1928, an Information was filed charging the said Hans P. Mortensen with violation of Section 3450 Revised Statutes; that on the 21st day of November, 1928, the said Hans P. Mortensen was arraigned upon said charge and pleaded guilty to violating the criminal provisions of Section 3450 Revised Statutes, and was fined in the sum of Two Hundred Fifty Dollars ($250.00) for the violation thereof;

VI.

That the Davies Motors, Inc., is a corporation, organized and existing under and by virtue of the State of California, and authorized to do business and is doing business as a dealer in Willys-Knight automobiles. in the City of San Diego, State of California;

VII.

That on the 3rd day of May, 1927, Mrs. H. P. Mortensen purchased from said corporation a Willys-Knight automobile under a conditional contract of sale, pursuant to which said corporation retained the title thereof until the purchase price should have been fully paid; that at the time of said sale, said corporation, in accordance with its custom, required and secured a credit statement from said purchaser in which said purchaser alleged that H. P. Mortensen, her husband hereinabove mentioned, was engaged in the interior decorating business on his own account and had been so engaged for a period of eight years; that as

assets said purchaser listed a house and lot in Omaha, Nebraska, of the then value of Eight Thousand Dollars ($8,000.00) and also gave two references, both of which said corporation investigated and found satisfactory; that said purchaser made the payments on said car regularly and on the due date, and on June 22, 1928, at the solicitation of one of said corporation's salesmen, said purchaser traded in the Willys-Knight automobile purchased on May 3, 1927, and purchased the Willys-Knight Roadster, engine #27-260, referred to above, on conditional sales contract under and pursuant to the terms of which said corporation retained the title thereto until all payments should have been completed; that the sale price of the said Willys-Knight Roadster purchased on June 22, 1928, was Thirteen Hundred Ninety-five ($1395.00) Dollars; that under the sale contract entered into between the purchaser and the said Davies Motors, Inc., the purchaser was required to make payments in the sum of Fifty-seven Dollars ($57.00) per month, commencing on July 22, 1928; that the net balance due on the said July 22, 1928, after allowing deductions for the trade in value for another car was Eight Hundred Ninety-six Dollars ($896.00); that the payment due on July 22, 1928, was not paid and that the claimant herein ascertained that the purchaser and her husband, H. P. Mortensen, had moved to Fresno, California, and thereupon demand was made upon the purchaser, and part of the said Fifty-seven Dollars ($57.00) was paid on August 6, and the balance thereof on August 7, 1928;

VIII.

That Davies Motors, Inc., Claimant herein, had no notice that said automobile was being used for illegal purposes, as charged in this Libel, or otherwise, and knew of no facts or circumstances which would reasonable or otherwise lead them to believe that the automobile was being so used; that the Davies Motors, Inc., is now and at all times mentioned, the legal owner of said Willys-Knight automobile; that no payments have been made under and pursuant to the aforementioned conditional sale contract since the 7th day of August, 1928, and that the said Davies Motors, Inc., is under and pursuant to the terms thereof entitled to the immediate and exclusive possession of said automobile and to all legal and equitable rights therein as the exclusive owner thereof.

SAMUEL W. McNABB
United States Attorney
Harry Graham Balter
HARRY GRAHAM BALTER
Assistant United States Attorney,
Attorneys for Libelant.

YOUNG & YOUNG,
By De Forrest Home
Attorney for Claimant, Davies Motors, Inc.

DATED: This 17 day of April, 1929.

[Endorsed]: Filed Apr. 17, 1929. R. S. Zimmerman, Clerk, by Murray E. Wire, Deputy Clerk

[TITLE OF COURT AND CAUSE.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This matter was submitted to the Honorable William P. James, Judge of the District Court of the Southern District of California, for his decision on the stipulation of facts entered into by and between Libelant, appearing by SAMUEL W. McNABB, United States Attorney for the Southern District of California, and HARRY GRAHAM BALTER, Assistant United States Attorney for the said District, and the Intervenor, and Claimant, DAVIES MOTORS, INC., a Corporation, appearing by YOUNG & YOUNG and DE FOREST HOME, an oral argument having been had, from the aforesaid stipulation the Court finds;

I.

That on or about the 27th day of September, 1928, Paul L. Mathias was and is a duly authorized and Acting Agent of the Commissioner of Prohibition of the United States;

II.

That on or about the 27th day of September, 1928, in the City of Fresno, County of Fresno, and within the Northern Division of the Southern District of California, the said Paul L. Mathias, acting on behalf of and for the said Commissioner of Prohibition of the United States, seized a certain Willys-Knight Roadster automobile, Engine No. 27-260, being the same automobile as is the respondent in the above named libel;

III.

That at the time the said respondent automobile was seized, as aforesaid, there was concealed and deposited therein, certain goods, merchandise and commodities, to-wit: Five (5) Pints of distilled spirits; that the said distilled spirits were fit for beverage purposes and then and there contained more than one-half of one per cent of alcohol by volume; that there was due upon the said Five (5) pints of distilled spirits, certain taxes imposed by the Act of November 23, 1921, known as the Willis-Campbell Act, and by the Revenue Act of 1921; that at the time when the said distilled spirits were concealed and deposited in the said automobile, as aforesaid, the taxes due thereon were unpaid and still remain unpaid; that there were no marks, stamps or labels on the said bottles of said distilled spirits to indicate that said taxes due thereon had been paid;

IV.

That the facts of the seizure are as follows: That on the evening of September 27, 1928, Agent Paul L. Mathias stationed himself in the rear of the Sequoia Hotel in the City of Fresno, State of California, and there saw one Hans P. Mortensen, alias H. P. Bender, in the act of removing Five (5) Pints of Mexican Smuggled Whiskey, bearing the label "Border Bell Bourbon Whiskey, etc.", from the said respondent automobile; that the said Mortensen had deposited and concealed the said smuggled whiskey in the respondent automobile with the intent to defraud the United States Government of the taxes due thereon; in violation of the provisions of Section 3450 Revised Statutes; that at the time of the arrest, the respond-

ent vehicle was being used by said Mortensen for the purpose of transporting the liquor seized therein.

V.

That on the 3rd day of October, 1928, the said Paul L. Mathias swore out a complaint before Samuel F. Hollins, United States Commissioner at Fresno, California, in which he charged that the said Hans P. Mortensen, alias H. P. Bender, did, on the 27th day of September, 1928, unlawfully possess and transport Twelve (12) one pint bottles of intoxicating liquor; that on the 19th day of November, 1928, an Information was filed charging the said Hans P. Mortensen with violation of Section 3450 Revised Statutes; that on the 21st day of November, 1928, the said Hans P. Mortensen was arraigned upon said charge and pleaded guilty to violating the criminal provisions of Section 3450 Revised Statutes, and was fined in the sum of Two Hundred Fifty Dollars ($250.00) for the violation thereof;

VI.

That the Davies Motors, Inc., is a corporation, organized and existing under and by virtue of the State of California, and authorized to do business and is doing business as a dealer in Willys-Knight automobiles, in the City of San Diego, State of California;

VII.

That on the 3rd day of May, 1927, Mrs. H. P. Mortensen purchased from said corporation a Willys-Knight automobile under a conditional contract of sale, pursuant to which said corporation retained the title thereof until the purchase price should have been fully paid; that at the time of said sale, said corpora-

tion, in accordance with its custom, required and secured a credit statement from said purchaser in which said purchaser alleged that H. P. Mortensen, her husband hereinabove mentioned, was engaged in the interior decorating business on his own account and had been so engaged for a period of eight years; that as assets said purchaser listed a house and lot in Omaha, Nebraska, of the then value of Eight Thousand Dollars ($8,000.00) and also gave two references, both of which said corporation investigated and found satisfactory; that said purchaser made the payments on said car regularly and on the due date, and on June 22, 1928, at the solicitation of one of the said corporation's salesmen, said purchaser traded in the Willys-Knight automobile purchased on May 3, 1927, and purchased the Willys-Knight Roadster, engine #27-260, referred to above, on conditional sales contract under and pursuant to the terms of which said corporation retained the title thereto until all payments should have been completed; that the sale price of the said Willys-Knight Roadster purchased on June 22, 1928, was Thirteen Hundred Ninety-Five ($1395.00) Dollars; that under the sale contract entered into between the purchaser and the said Davies Motors, Inc., the purchaser was required to make payments in the sum of Fifty-Seven Dollars ($57.00) per month, commencing on July 22, 1928; that the net balance due on the said July 22, 1928, after allowing deductions for the trade in value for another car was Eight Hundred Ninety-Six Dollars ($896.00); that the payment due on July 22, 1928, was not paid and that the claimant herein ascertained that the purchaser and her husband, H. P. Mortensen, had moved

to Fresno, California, and thereupon demand was made upon the purchaser, and part of the said Fifty-Seven Dollars ($57.00) was paid on August 6, and the balance thereof on August 7, 1928;

VIII.

That Davies Motors, Inc., Cal*i*mant herein, had no notice that said automobile was being used for illegal purposes, as charged in this Libel, or otherwise, and knew of no facts or circumstances which would reasonably or otherwise lead them to believe that the automobile was being so used; that the Davies Motors, Inc., is now and at all times mentioned, the legal owner of said Willys-Knight automobile; that no payments have been made under and pursuant to the aforementioned conditional sale contract since the 7th day of August, 1928, and that the said Davies Motors, Inc., is under and pursuant to the terms thereof entitled to the immediate and exclusive possession of said automobile and to all legal and equitable rights therein as the exclusive owner thereof.

FROM THE FOREGOING FACTS THE COURT FINDS AS CONCLUSIONS OF LAW:

I.

That the above named vehicle should be forfeited to the United States of America for violation of the provisions of Section 3450 Revised Statutes:

That the Libelant, United States of America, should recover from the Intervenor and Claimant, Davies Motors, Inc. its costs of suit and the storage and warehouse charges properly incurred since the date of seizure.

DATED: This 20 day of June, 1929.

Wm P James
United States District Judge.

APPROVED AS TO FORM AS
PROVIDED IN RULE 44.
Young & Young
by De Forrest Home

[Endorsed]: Received copy of within this 6 day of June, 1929 Young & Young by De Forrest Home. Filed Jun. 20, 1929 R. S. Zimmerman, Clerk. By D. W. Ramsey, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

DECREE

This matter was submitted to the Honorable William P. James, Judge of the District Court of the Southern District of California, for his decision on the stipulation of facts entered into by and between Libelant, appearing by SAMUEL W. McNABB, United States Attorney for the Southern District of California, and HARRY GRAHAM BALTER, Assistant United States Attorney for the said District, and the Intervenor and Claimant, DAVIES MOTORS, INC., a Corporation, appearing by YOUNG & YOUNG and DE FOREST HOME, and the Court having filed its Findings of Fact and Conclusions of Law:

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that the automobile described in the Libel in this case be, and the same accordingly is condemned as forfeited to the United States, and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the Clerk of this Court issue a writ of Venditioni Exponas directed to the Marshall of the Southern District of California, commanding him to sell the aforesaid automobile, its tools and appurtenances at public action, after giving notice as required by law by publishing the notice of sale in a newspaper of general circulation, published in or near the place of sale, the first publication of said notice to be at least fourteen (14) days prior to the date of said sale, and that upon the return of the said writ into this Court, the said Marshal deposit the proceeds with the Clerk of this Court to be disposed of as provided by law;

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the Libelant, United States of America, recover from the Intervenor and Claimant, Davies Motors, Inc., its costs of suit incurred herein together with the storage and other charges incurred for the maintenance of said vehicle since the date of seizure. Costs taxed at $77.55.

DATED: This 20 day of June, 1929.

Wm P James

United States District Judge.

APPROVED AS TO FORM AS
PROVIDED IN RULE 44.
Young & Young
By De Forrest Home

Decree entered and recorded Jun 20 1929 R. S. Zimmerman, Clerk, by Murray E. Wire Deputy Clerk.

[Endorsed]: Received copy of within this 6 day of June 1929 Young & Young by De Forrest Home

Attorney for Intervenor. Filed Jun 20 1929 R. S. Zimmerman, Clerk by D. W. Ramsey Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

ORDER

Upon the Stipulation of the parties and good cause appearing therefore and it appearing to the court that a good and satisfactory bond has been filed with the court in the sum of Four Hundred Dollars ($400.00) conditioned that in the event final judgment herein is entered in favor of libelant that said surety will pay to the libelant the said sum of Four Hundred Dollars ($400.00).

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that said bond shall be substituted and it is hereby accepted in the place and stead of said respondent automobile and that all further proceedings herein shall be against said bond;

IT IS FURTHER ORDERED that said respondent automobile, to wit: One Willys-Knight Roadster Automobile, Engine #27-260, be delivered to the intervener, or its agent, free from any further claim or lien of the libelant herein.

Done in open court this 20 day of June, 1929.

Wm P. James

Judge.

[Endorsed]: Filed Jun. 20, 1929. R. S. Zimmerman, Clerk, by D. W. Ramsey, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

AMENDMENT TO DECREE AND ORDER FOR RELEASE OF AUTOMOBILE.

It appearing to the Court that Stipulation of the parties has heretofore been filed herein, to-wit: on June 20, 1929, providing for the release of the respondent automobile herein upon the filing with the Court of a good and satisfactory bond in the sum of Four Hundred ($400.00) Dollars to be substituted in the place and stead of the respondent automobile herein, and good cause appearing therefor:

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the Final Decree heretofore filed herein be modified to the extent that the order for sale of the said automobile be and the same is hereby vacated, and

IT IS FURTHER ORDERED that the said respondent automobile, to-wit: One Willys-Knight Roadster Automobile, Engine No. 27-260, be and the same is hereby ordered released to the Intervenor or its Agent upon the payment of all storage charges heretofore incurred by the United States of America concerning said automobile, and upon the posting with the Court of a good and satisfactory bond in the sum of Four Hundred ($400.00) Dollars, to be approved by the Court, conditioned that in the event the Final Decree heretofore entered herein becomes final, by lapse of time within which appeal may be taken or be affirmed upon appeal in the event an appeal is taken, then and in that event the Surety on said bond will pay to the Libelant the said sum of Four Hundred

($400.00) Dollars, within ten (10) days after notice of said decree having become final or affirmed on appeal, and that if not so paid within said ten (10) day period execution may issue therefor, and that in the event the decree herein shall be reversed and final judgment entered for the Intervenor, then said bond shall be exonerated and the obligation thereunder terminated; and

IT IS FURTHER ORDERED that said bond shall be substituted in the place and stead of said respondent automobile herein and that all further proceedings herein shall be against said bond.

DATED: This 26 day of June, 1929.

Wm. P. James
United States District Judge.

APPROVED AS TO FORM
Samuel W. McNabb
SAMUEL W. McNABB,
United States Attorney,
Ignatius F. Parker
IGNATIUS F. PARKER,
Assistant United States Attorney.
Attorneys for Libelant.
YOUNG & YOUNG,
By De Forrest Home
De Forest Home.
Attorneys for Intervenor.

Decree entered and recorded Jun 26 1929 R. S. ZIMMERMAN Clerk. By Murray E. Wire Deputy Clerk

[Endorsed]: Filed Jun. 26, 1929. R. S. Zimmerman, Clerk, by Murray E. Wire Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

PETITION FOR APPEAL.

To the Honorable William P. James, Judge of the above entitled court:

Comes now Davies Motors, Inc., Intervener herein, by its attorneys, Young & Young, and feeling it is aggrieved by the final decree entered in this action, hereby prays that an appeal may be allowed, to-wit: From the United States District Court for the Southern District of California, Northern Division to the United States Circuit Court of Appeals to the Ninth Circuit and in connection with this petition petitioner hereby presents its assignment of errors.

YOUNG & YOUNG,
By De Forrest Home
Attorneys for Intervener.

Dated: June 27, 1929.

[Endorsed]: Filed Jun. 28, 1929. R. S. Zimmerman, Clerk, by Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

ASSIGNMENT OF ERRORS.

Comes now Davies Motors, Inc. intervener herein by its attorneys, Young and Young, and alleges in its petition for appeal that in the record proceedings and in the final judgment of the above entitled action material error has intervened to the substantial prejudice of the plaintiff, towit:

I.

That the Honorable Court erred in its conclusions of law, in that it concluded that the respondent auto-

mobile herein should be forfeited to the United States of America for a violation of the provisions of Section 3450 Revi*des* Statutes.

II.

That the Honorable Court herein erred in that in its conclusions of law it concluded that the United States of America should recover from the intervener-claimant, Davies Motors, Inc., its costs of suit herein incurred and its storage and warehouse charges incurred since the date of seizure.

III.

That the Honorable Court erred in its decree entered herein in this, that said decree ordered, adjudged and decreed that the judgment be for the libelant and that the respondent automobile be declared forfeited to the libelant and that said libelant recover its costs of action for storage charges from the intervener and that said decree and all thereof was contrary to law and should have been rendered in favor of Davies Motors, Inc., the intervener, dismissing said libel and said respondent automobile, and ordering said respondent automobile released to the intervener free from all claim of the libelant.

WHEREFORE, Intervener prays that the decree herein be reversed and that the above entitled court be ordered to enter a decree declaring the above named respondent automobile released to the intervener and dismissing the libel herein and adjudging said respondent automobile and/or the bond substituted in

its place free from any claim, right, title or interest of the libelant herein.

Dated this 28th day of June, 1929.

YOUNG & YOUNG
By De Forrest Home
Attorneys for Intervener.

We hereby certify that the foregoing assignment of errors is made on behalf of the intervener herein for an appeal and it is our opinion and the same now constitutes an assignment of errors upon the appeal prayed for.

YOUNG & YOUNG
By De Forrest Home
Attorneys for Intervener.

[Endorsed]: Filed Jun. 28, 1929 R. S. Zimmerman, Clerk, by Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

ORDER ALLOWING APPEAL.

Good cause appearing therefor,

IT IS ORDERED that the Appeal prayed for in the petition for Appeal in the above entitled action be and the same hereby is allowed.

IT IS FURTHER ORDERED that the bond in the amount of $250.00 heretofore filed in the above entitled action guaranteeing the payment of costs in said action may be and it hereby is accepted in the place and stead of any Further bond on appeal, and any costs recoverable by the libelant herein shall be charge-

able against and recoverable from said bond heretofore approved and filed.

Dated: June 28, 1929.

Wm P. James
United States District Judge for the Southern District of California.

[Endorsed]: Filed Jun. 28, 1929. R. S. Zimmerman, Clerk, by Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

UNDERTAKING FOR COSTS.

WHEREAS, the Davies Motors, Inc. a corporation, has appeared herein as an intervener in a libel filed on behalf of the United States of America, and

WHEREAS, security for costs that may be awarded against said intervener is required,

NOW, THEREFORE, the undersigned, a corporation, organized and existing under and by virtue of the laws of the State of New York, in consideration of the premises herewith undertakes in the sum of TWO HUNDRED FIFTY AND NO/100 ($250.00) DOLLARS and promises to the effect that it will pay such amount not exceeding Two hundred fifty and no/100 ($250.00) Dollars, as may be adjudged as costs against said Davies Motors, Inc., in or pursuant to the above entitled action.

IN WITNESS WHEREOF said corporation has signed the foregoing undertaking by its duly authorized attorney in fact this 22nd day of January, 1929.

AMERICAN SURETY COMPANY OF NEW YORK
[SEAL]

By J. C. Ashburn
Resident Vice President.
Attest: H. R. Durrow
Resident Assistant Secretary.

Premium charged for this bond is $10.00 per annum.

STATE OF CALIFORNIA)
) SS.:
County of Los Angeles.)

ON THIS 22nd day of January A. D. 1929, before me, FRANK MCWHORTER a Notary Public in and for Los Angeles County, State of California, residing therein, duly commissioned and sworn, personally appeared J. C. ASHBURN personally known to me to be the Resident Vice-President and H. R. DURROW personally known to me to be the Resident Assistant Secretary of the AMERICAN SURETY COMPANY OF NEW YORK, the Corporation described in and that executed the within instrument, and known to me to be the persons who executed the within instrument on behalf of the Corporation therein named, and acknowledged to me that such Corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[SEAL] Frank McWhorter
Notary Public in and for the County of Los Angeles, State of California.

My Commission expires
My Commission Expires Feb. 3, 1932.

[Endorsed]: Filed Jan 22 1929 R. S. Zimmerman, Clerk By M. L. Gaines, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

UNDERTAKING ON RELEASE OF AUTOMOBILE.

WHEREAS, a final decree has been entered in the above entitled action in favor of the Libelant herein; and

WHEREAS, the Court has ordered the respondent automobile released and delivered to the intervener upon deposing a bond to be approved by the Court, in the penal sum of Four Hundred Dollars ($400.00);

NOW, THEREFORE, the undersigned, a corporation organized and existing under and by virtue of the laws of the State of New York, surety herein, in consideration of the premises herein, undertakes in the sum of Four Hundred Dollars ($400.00), and promises that in the event the final decree herein shall become final, or by lapse of time within which an appeal may be taken, or by affirmance on appeal, in the event an appeal is taken, in favor of the libelant, that said surety will pay to said libelant within ten (10) days after notice that the final decree has become final, as aforesaid, or has been affirmed on appeal, as aforesaid, the said sum of Four Hundred Dollars ($400.00).

In the event that said final decree shall be reversed on appeal and/or shall become final in favor of the intervener, no responsibility shall attach to said surety under the provisions of this bond, and the obligation thereunder will be discharged.

IN WITNESS WHEREOF, said corporation has signed the foregoing undertaking by its duly authorized attorney-in-fact this 26th day of June, 1929.

AMERICAN SURETY COMPANY OF
[SEAL] NEW YORK
By A. M. Wold
Resident Vice-President
ATTEST: H. R. Durrow
Resident Assistant-Secretary.

Approved as to form in accordance with Rule 44.
SAMUEL W. McNABB,
United States Attorney,
By Ignatius F. Parker, Asst. U. S. Atty.
Attorney for Libelant.
YOUNG & YOUNG,
By De Forrest Home
Attorneys for Intervener.

Bond approved by the court this 26th day of June, 1929.

Wm. P. James,
Judge.

Premium charged for this bond is $10.00 for the term.

STATE OF CALIFORNIA)
) ss.:
COUNTY OF LOS ANGELES.)

ON THIS 26th day of June A. D. 1929, before me FRANK MCWHORTER a Notary Public in and for Los Angeles County, State of California, residing therein, duly commissioned and sworn, personally appeared A. M. WOLD personally known to me to be the Resident Vice-President and H. R. DURROW personally known to me to be the Resident Assistant Secretary of the AMERICAN SURETY COMPANY [SEAL] OF NEW YORK, the Corporation described in and that executed the within instrument, and known to me to be the persons who executed the within instrument on behalf of the Corporation therein named, and acknowledged to me that such Corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

Frank McWhorter

Notary Public in and for the County of Los Angeles, State of California.

My Commission expires

My Commission Expires Feb. 3, 1932.

[Endorsed]: Received copy of the within this 26th day of June 1929 I. F. Parker Asst. U. S. Atty Attorney for Libelant. Filed Jun 26 1929 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

STIPULATION OMITTING TITLE.

IT IS HEREBY STIPULATED by and between the parties hereto, thru their respective counsel, that in the printing of the transcript on appeal herein the title of the court, and the title of the cause, and the captions on the pleadings may be indicated thus (Title of Court and Cause) and need not be printed in full, and that the endorsement on such papers or documents, excepting filing endorsements, may also be omitted.

SAMUEL W. McNABB,
United States Attorney.
By Ignatius F. Parker
Assistant United States Atty.
Attorneys for Libelant
YOUNG & YOUNG,
By De Forrest Home
Attorneys for Intervener.

Approved: this 3 day of July 1929.

Wm. P. James
United States District Judge for the
Southern District of California.

[Endorsed]: Filed July 3, 1929. R. S. Zimmerman, Clerk, by Edmund L. Smith, Deputy.

[TITLE OF COURT AND CAUSE.]

PRAECIPE TO THE CLERK OF SAID COURT.

You are hereby notified to prepare and certify copies of such papers filed and all such proceedings had in the above entitled action as are necessary to the determination of the cause on appeal and in particular the following instruments.

1. Libel.
2. Petition in intervention of Davies Motors, Inc.
3. Stipulation of Facts.
4. Findings of Fact and Conclusions of Law.
5. Decree.
6. Order dated June 26, 1929 to release automobile upon substitution of bond.
7. Order approving bond dated June 26, 1929.
8. Petition for Appeal.
9. Order allowing appeal.
10. Assignment of Errors.
11. Citation on Appeal.
12. Stipulation and order omitting title of the court and title of the cause.
13. Order approving prior bond.
14. Praecipe.

Dated this 28th day of June, 1929.

YOUNG & YOUNG,
By De Forrest Home
Attorneys for Intervener.

[Endorsed]: Received copy of the within Praecipe this 28th day of June 1929 Ignatius F. Parker Asst. U. S. Attorney for Libelant Filed Jun 28 1929 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk

[TITLE OF COURT AND CAUSE.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 44 pages, numbered from 1 to 44 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; libel; complaint in intervention; stipulation of facts; findings of fact and conclusions of law; decree; order; amendment to decree and order for release of automobile; petition for appeal; assignment of errors; order allowing appeal; undertaking for costs; undertaking on release of automobile; stipulation omitting titles, and praecipe.

I DO FURTHER CERTIFY the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to $7.10 and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, South-

ern Division, this 24th day of July, in the year of Our Lord One Thousand Nine Hundred and Twenty-nine, and of our Independence the One Hundred and Fifty-fourth.

R. S. ZIMMERMAN,
Clerk of the District Court of the United States of America, in and for the Southern District of California.

(Seal)

By EDMUND L. SMITH,
Deputy.

No. 5889

United States
Circuit Court of Appeals
For the Ninth Circuit.

DAVIES MOTORS, INC.,
Intervenor and Appellant,
vs.
UNITED STATES OF AMERICA,
Libelant and Appellee,
ONE WILLYS-KNIGHT ROADSTER AUTOMOBILE, Engine #27-260,
Respondent.

Upon Appeal from the United States District Court for the Southern District of California, Northern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October Term, A. D. 1929, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Wednesday, the sixteenth day of October, in the year of our Lord one thousand nine hundred and twenty-nine. Present: Honorable FRANK H. RUDKIN, Circuit Judge, Presiding; Honorable FRANK S. DIETRICH, Circuit Judge; Honorable CURTIS D. WILBUR, Circuit Judge.

[Title of Cause.]

ORDER OF SUBMISSION.

ORDERED above cause argued by Mr. De Forrest Home, counsel for the appellant, and by Mr. Emmett E. Doherty, Assistant United States Attorney, counsel for the appellee, and submitted to the Court for consideration and decision, with leave to counsel to file stipulation concerning certain facts.

[Title of Court and Cause.]

STIPULATION.

WHEREAS, some uncertainty has arisen with reference to the intent of the parties and of the Court in using the word "smuggled" in the transcript of record, and

WHEREAS, there was no question raised upon the trial of the issues of fact as to the smuggling of the liquor in question into the United States either by the driver of the respondent automobile, or by anyone else, and

WHEREAS, the Circuit Court of Appeals for the Ninth Circuit in open court has granted the parties hereto permission to file the within stipulation,—

NOW, THEREFORE, IT IS STIPULATED by and between the parties hereto, thru their respective attorneys, that wherever the word "smuggled" or any related word or words appears or appear in the transcript of record or in the briefs on appeal, the same may be stricken from the record and that the Court of Appeals may hear and determine the above-entitled case in the same manner and with the same effect as if said word or words had been omitted entirely; this stipulation has particular reference to page 22, line 2 of the transcript of record which should read, "five pints of Mexican whiskey," instead of "five pints of Mexican smuggled whiskey," page 27, line 6 of the transcript of record, which should read "five pints of Mexican whiskey," instead of "five pints of Mexican smuggled whiskey," and to any other place where said word or its equivalent appears.

Dated this 21st day of October, 1929.

SAMUEL W. McNABB.
SAMUEL W. McNABB,
United States Attorney.
HARRY GRAHAM BALTER.
HARRY GRAHAM BALTER,
Assistant United States Attorney.
EMMETT E. DOHERTY.
EMMETT E. DOHERTY,
Assistant United States Attorney.
YOUNG & YOUNG,
By DE FORREST HOME,
Attorneys for Intervener.

[Endorsed]: Stipulation. Filed Oct. 23, 1929. Paul P. O'Brien, Clerk.

At a stated term, to wit, the October Term, A. D. 1929, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Tuesday, the twelfth day of November, in the year of our Lord one thousand nine hundred and twenty-nine. Present: Honorable FRANK H. RUDKIN, Circuit Judge, Presiding; Honorable FRANK S. DIETRICH, Circuit Judge; Honorable CURTIS D. WILBUR, Circuit Judge.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE.

By direction of the Honorable Frank H. Rudkin, Frank S. Dietrich and Curtis D. Wilbur, Circuit Judges, before whom the cause was heard, ORDERED that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the Clerk and that a decree be filed and recorded in the minutes of this court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION U. S. CIRCUIT COURT OF APPEALS.

Before RUDKIN, DIETRICH and WILBUR, Circuit Judges.

WILBUR, Circuit Judge.—The intervener and appellant sold the Willys-Knight roadster automobile, respondent herein, to one Hans P. Mortensen by a conditional sales contract under which it retained ownership of the automobile. At the time the automobile was seized by a Government prohibition agent September 27, 1928, the balance due on the purchase price was $896.00. The district attorney filed a libel under section 3450, Revised Stat-

utes (26 U. S. C. A., § 1181), alleging that at the time the automobile was seized it contained twelve pint bottles of intoxicating liquor which had been concealed therein with the intent to defraud the United States Government of the taxes due thereon. The sole question presented by the appeal is whether or not, under the facts stipulated by the parties and found by the trial court, the rights of the intervener are forfeited under section 3450, or whether, being innocent of all complicity in the wrongful acts of Mortensen, it can invoke the provisions of section 26 of the National Prohibition Act (27 U. S. C. A., § 40).

It appears from the stipulation that at the time the automobile was seized by Paul L. Mathias, prohibition agent, he had stationed himself in the rear of the Sequoia Hotel in Fresno and saw Mortensen remove five pints of whiskey from the respondent automobile.

It is stipulated that the prohibition agent would testify that when he arrived at the rear of the hotel to make the seizure the Willys-Knight automobile was standing still and at the time the seizure was actually made it was not in motion, and that Mortensen would testify that on the night in question just prior to the seizure he drove up to the back of the Sequoia Hotel in the respondent automobile in which the liquor was found. Upon this stipulation the Court found that at the time of the arrest the respondent vehicle was being used by Mortensen for the purpose of transporting liquor seized

therein. On October 3, 1928, the prohibition agent swore out a complaint before the United States Commissioner in which he charged that Hans P. Mortensen did, on the 27th day of September, 1928 "unlawfully possess and transport twelve one pint bottles of intoxicating liquor." On the 19th of November, 1928, an information was filed charging the said Hans P. Mortensen with violation of section 3450, Rev. Stat. On the 21st day of November, 1928, Mortensen pleaded guilty to violating the criminal provisions of section 3450 of the Rev. Stats. and was fined $250 for the violation thereof.

The United States Circuit Court of Appeals for the Fourth Circuit has recently rendered an opinion under a similar state of facts holding that a forfeiture under section 3450, Rev. Stats., was proper. In that case the facts were more favorable to the intervener than in this case for the reason that there the prohibition officer stopped the offending automobile which was being operated along the highway and upon searching the car found "twelve gallons of whisky." In that case the Court said:

> "An intervening petition claiming the car was filed by the Richbourg Motor Company, the innocent holder of an unsatisfied purchase-money lien thereon, but the District Judge ordered it forfeited, and the motor company has appealed.
>
> "We think that the decree of forfeiture was clearly correct. U. S. vs. One Ford Coupe, 272 U. S. 321, 331, 47 S. Ct. 154, 71 L. Ed.

279, 47 A. L. R. 1025; U. S. vs. Commercial Credit Co. (C. C. A. 4th), 20 F. (2d) 519; General Motors Acceptance Corporation vs. U. S. (C. C. A. 4th), 23 F. (2d) 799. The case at bar differs from the cases of Port Gardner Investment Co. vs. U. S., 272 U. S. 564, 47 S. Ct. 165, 71 L. Ed. 412, and Commercial Credit Co. vs. U. S., 276 U. S. 266, 48 S. Ct. 232, 72 L. Ed. 541, in that in those cases the persons in the automobiles which were proceeded against were prosecuted and convicted under the National Prohibition Act, and it was held that this precluded the government from resorting to proceedings under section 3450 against the automobiles. Here the United States attorney has elected to proceed against the occupants of the car, as well as against the car itself, under the revenue statutes." (Richbourg Motor Co. vs. U. S., 34 F. (2d) 38.)

In so deciding that Court followed its previous decision (The United States vs. Commercial Credit Co., 20 Fed. 519), where it dealt with the subject at length. And also its decision in the case of Gen. Motors Acceptance Corp. vs. U. S., 23 Fed. (2d) 799, decided January 10, 1928, where it stated the rule by which it had been guided in these cases, as follows:

"This court has held that an automobile may be seized for violation of section 3450, Revised Statutes, and proceeded against under section 26 of title 2 of the National Prohibition

Act, or *vice versa*, and that the report or action of the seizing officers does not bind the government to an election as to which section may be used in the forfeiture proceeding."

The Circuit Court of Appeals of the Fifth Circuit, however, in United States vs. Gen. Motors Acceptance Corp., 25 Fed. (2d) 238, reached the opposite conclusion, as shown by the following quotation from its opinion therein:

"* * * * Assuming that it is possible to prove that one who uses a vehicle in the removal or for the deposit or concealment of untax-paid liquor has the necessary intent under section 3450 to defraud the United States of a tax which existing law neither requires nor permits to be paid, it is nevertheless true that, if a person be caught in the act of unlawfully transporting liquor in a vehicle, there is no authority of law to proceed under section 3450, either to prosecute the person or to forfeit the vehicle."

In reaching its conclusion that court considered the recent decisions by the Supreme Court bearing upon that question including those above cited, and also the later opinion in Commercial Credit Co. vs. U. S., 276 U. S. 226, but said:

"In our opinion proceedings taken after the arrest and seizure are immaterial, as it was the duty of the government under section 26 to prosecute him for unlawful possession and transportation."

The above decision, by the Circuit Court of Appeals for the Fifth Circuit, may be distinguished from the facts in the case before us for the reason that in the case at bar, although as a matter of fact the automobile was being used for the transportation of liquor, there is no evidence that the prohibition agent witnessed the transportation and it is stipulated in effect that he would testify that he did not. We are disposed to follow the decisions and the line of reasoning of the Circuit Court of Appeals of the Fourth Circuit above quoted. The Supreme Court has held that after conviction for violation of section 26 of the National Prohibition Act the offending vehicle cannot be libeled under section 3450. (Commercial Credit Co. vs. U. S., *supra.*) It seems clear to us that notwithstanding section 26 of the National Prohibition Law provides that the arresting officer shall proceed thereunder to prosecute the offender and to forfeit the offending vehicle, that this provision must be construed with relation to the duties of the United States attorney upon the presentation of the matter to him by the arresting officer. It is the duty of the United States attorney to enforce all the criminal laws (R. S. 771, 28 U. S. C. A. 485), and where there are two criminal laws apparently violated at the same time or by substantially the same act, he must determine whether he will prosecute either or both and that determination must be based in a measure on his judgment as to the probable results of the prosecution. A Judge in a civil action may un-

hesitatingly decide the facts to be that the vehicle in question was engaged in transporting liquor in violation of the National Prohibition Act, but in a criminal prosecution that fact must be established beyond a reasonable doubt in the minds of each of twelve jurors, and where the evidence is circumstantial the circumstances shown to the jury must be inconsistent with every reasonable hypothesis other than that of guilt. The prohibition officer may testify that the automobile in question was in motion at the time of the arrest, but the United States attorney is not required to accept his statement and the jury may entirely disregard his sworn testimony to that effect. Regardless of the assertions of those who bring the facts to the attention of the United States attorney he must determine what facts, in his judgment, he can establish before a jury in a criminal case, and his action should be in accordance with that determination. We see no reason for holding that the United States attorney is bound to proceed under section 26 because the officer who seizes the automobile and makes the arrest asserts the fact to be that the automobile was actually in motion at the time of the arrest or immediately prior thereto, and that the transportation of intoxicating liquor in the automobile was observed by him. Experience may demonstrate to the United States attorney that a conviction on the evidence could not be obtained. If the United States attorney can properly proceed under the facts brought to his attention under either section

26 of the National Prohibition Law or under section 3450 of the Revised Statutes, the mere fact that section 26 of the National Prohibition Act provides that the arresting officer "shall at once proceed against the person arrested under the provisions of this title," does not make it the duty of the United States attorney to proceed under section 26. The officer making the arrest can only proceed by and through the United States attorney and when he has brought the facts to the United States attorney that officer must determine the course that shall be thereafter pursued. By section 3450 it is provided that if the vehicle was used for the concealing of liquor with intent to defraud the United States of the tax thereon, it shall be forfeited to the United States.

Section 838 of the Revised Statutes (19 Stat. 241; 28 U. S. C. A. 486) provides that:

> "It shall be the duty of every district attorney to whom any collector of customs, or of internal revenue, shall report, according to law, any case in which any fine, penalty, or forfeiture, has been incurred in the district of such attorney for the violation of any law of the United States relating to the revenue, to cause the proper proceedings to be forfeitures in such case provided, unless, upon inquiry and examination, he shall decide that such proceedings cannot probably be sustained, or that the ends of public justice do not require that such proceedings should be instituted; in which case

he shall report the facts in customs cases to the Secretary of the Treasury, and in internal revenue cases to the Commissioner of Internal Revenue for their direction."

It is as much the duty of the district attorney to proceed under this law as it is under the National Prohibition Act. He must determine the proper course to pursue. As was said by the Supreme Court of the United States in Confiscation Cases, 7 Wall. 454 (74 U. S. 454), 457:

> "Public prosecutions, until they come before the court to which they are returnable, are within the exclusive direction of the district attorney, and even after they are entered in court, they are so far under his control that he may enter a *nolle prosequi* at any time before the jury is empanelled for the trial of the case, except in cases where it is otherwise provided in some act of Congress.
>
> " * * * Settled rule is that those courts will not recognize any suit, civil or criminal, as regularly before them, if prosecuted in the name and for the benefit of the United States, unless the same is represented by the district attorney, or some one designated by him to attend to such business, in his absence, as may appertain to the duties of his office."

Judgment affirmed.

[Endorsed]: Opinion. Filed Nov. 12, 1929. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 5889.

DAVIES MOTORS, INC., a Corporation, Claimant of One Willys-Knight Roadster Automobile, Engine #27-260,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

DECREE U. S. CIRCUIT COURT OF APPEALS.

Appeal from the District Court of the United States for the Southern District of California, Northern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of California, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, affirmed.

[Endorsed]: Decree. Filed and entered Nov. 12, 1929. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing sixty-one (61) pages, numbered from and including 1 to and including 61, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel on behalf of the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 6th day of January, A. D. 1930.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 24, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted, and the case is assigned with case No. 452, Richbourg Motor Company, Intervenor, vs. United States of America, for argument as one case.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.